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Academic Freedom in K-12 Education

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I. INTRODUCTION

The principle of "academic freedom" is part of the culture of American education. But what are the legal contours of this principle? And, what protections do K-12 teachers actually enjoy in their schools and classrooms?

For purposes of this article, "academic freedom" will mean the First Amendment protections of professional discretion that a public school teacher may exercise in the course of performing his or her teaching functions. As used here, "academic freedom" does not include the First Amendment rights enjoyed by all public employees "to speak out, as a citizen, on matters of public concern,"[1] at least when those rights are exercised outside the school environment.

The discussion that follows will focus on academic freedom in K-12 schools. It must be recognized, however, that much of the case law positing principles of academic freedom has been generated by disputes arising in the arena of higher education, and some of those cases will be noted in the first part of the discussion that follows.[2]

II. THE CONCEPT OF ACADEMIC FREEDOM

Endorsing the Concept

The Supreme Court has provided ringing endorsements of the general concept of "academic freedom" in reference to higher education. In *Sweezy v. New Hampshire*,[3] the Court stated:

> The essentiality of freedom in the community of American universities is almost self-evident. . . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to

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1. Faerber v. City of Newport, 51 F. Supp.2d 115, 120 (D.R.I. 1999)(discussing the First Amendment right of public employees to speak out on matters of public concern).
2. An extensive discussion of academic freedom that includes both K-12 and post-secondary education cases is provided in W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301 (1998).
3. 354 U.S. 234 (1957).

> evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[4]

And in *Keyishian v. Board of Regents*[5] the Court stated:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us, and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.[6]

Locus of Academic Freedom

The "essential freedoms" of the academy were delineated in this often-cited passage from Justice Frankfurter's concurrence in *Sweezy*:

> It is the business of a university to provide an atmosphere most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university – to determine for itself on academic grounds who may teach, *what may be taught, how it shall be taught,* and who may be admitted to study.[7]

At least one lower court has thought this principle applicable to K-12 education. In *Boring v. Buncombe County Board of Education*,[8] the Court of Appeals for the Fourth Circuit stated that these "four essential freedoms" should also apply to public schools, "unless quite impracticable or contrary to law."[9]

As the language in these excerpts implies, the benefits of "academic freedom" is vested in the academy, not in the academicians. In fact, educational institutions enjoy an "academic freedom" that is in some ways at odds with the notion of a teacher's "academic freedom" in the classroom. As the Court noted in another higher education case, "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself."[10]

Urofsky v. Gilmore,[11] another higher education case, provided a thorough review of the history and constitutional dimensions of "academic freedom." The Court of Appeals for the Fourth Circuit concluded that "to the extent the Constitution recognizes any right of 'academic freedom' above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors.[12]

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4. *Id.* at 250.
5. 385 U.S. 589 (1967).
6. *Id.* at 603.
7. *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring)(emphasis added).
8. Boring v. Buncombe County Bd. of Educ., 136 F.3d 364 (4th Cir. 1998).
9. *Id.* at 370.
10. Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n. 12 (1985)(internal citations omitted).
11. 216 F.3d 401 (4th Cir. 2000).
12. *Id.* at 410.

That the academy, not the academician, is the locus of "academic freedom" is borne out by the majority of cases. Nevertheless, as will be discussed below, a teacher's in-school expression does sometimes enjoy a modicum of constitutional protection.

III. CONSTITUTIONAL CONTOURS OF ACADEMIC FREEDOM EXPRESSED

This part sets out the constitutional contours of "academic freedom" in K-12 education. The intent is to provide a framework of basic principles that can be applied by both attorneys and educators.

Authority of School Officials

The Supreme Court has often acknowledged the power of the state and of school district boards and administrators to exercise reasonable control over curriculum, instruction, and other school activities. This power is, however, subject to constitutional constraints.

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech, inquiry and belief. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. On the other hand, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.[13]

"[L]ocal school boards must be permitted to establish and apply their curriculum in such a way as to transmit community values, and there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political."[14] At the same time, however, the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.[15]

Role of Teachers

Although the Supreme Court has noted "[t]he State's undoubted right to prescribe the curriculum for its public schools,"[16] it has also

13. Epperson v. Arkansas, 393 U.S. 97, 104 (1968)(citation omitted)(brackets in original).
14. Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 899 F. Supp. 1443, 1452 (M.D.N.C. 1995).
15. *See* Board of Educ. of Island Trees Sch. Dist. v. Pico, 457 U.S. 853, 869 (1982)(Brennan, J., plurality opinion).
16. *Epperson*, 393 U.S. at 107.

acknowledged the important role that teachers play in delivering that curriculum to the students.

> Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students' experience to achieve educational goals, teachers, by necessity, have wide discretion over the way the course material is communicated to students. They are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring.[17]

Public school teachers do enjoy the protections of the Constitution in their employment setting. "First Amendment rights, applied in light of the special characteristics of the school environment, are available to *teachers* and students."[18] However, teachers' speech in the role of "teacher" is, in certain contexts, subject to school control. If school facilities are not open for "indiscriminate use by the general public," then the school is not a public forum and "school officials may impose reasonable restrictions on the speech of students, *teachers*, and other members of the school community."[19]

A First Amendment Right

As noted in the introduction, "academic freedom" is not an independent constitutional right. Instead of positing a new, distinct right of academic freedom grounded in the Constitution, courts analyze academic freedom cases as free speech claims, though in a distinct set of contexts and therefore implicating a distinct set of rules.[20]

In evaluating a teacher's First Amendment claim, a federal district court used the term "academic expression" rather than "academic freedom."[21] This terminology may prove to be a useful denotation of teacher expression that may enjoy some constitutional protection.

Some courts have stated that, at least to some extent, the First Amendment protects a teacher's classroom discussion.[22] For example,

17. Ambach v. Norwick, 441 U.S. 68, 78-79 (1979).
18. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)(emphasis added).
19. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988)(emphasis added).
20. *See* Hosford v. School Comm. of Sandwich, 659 N.E.2d 1178, 1180 (Mass. 1996); *see also* Miles v. Denver Pub. Sch., 944 F.2d 773, 775 (10th Cir. 1991).
21. Cockrel v. Shelby County Sch. Dist., 81 F. Supp. 2d 771, 775 (E.D. Ky. 2000).
22. *See* Kingsville Indep. Sch. Dist. v. Cooper, 611 F.2d 1109, 1113 (5th Cir. 1980)(discussing how an instructor's "classroom discussion is protected activity"); Krizek v. Cicero-Stickney Township High Sch. Dist. 201, 713 F. Supp. 1131, 1137 (N.D. Ill. 1989)(discussing how individual teachers must be given some measure of academic freedom to "develop inquisitive minds and independent thought." However, this freedom must be balanced with the second function of the public school system, which is to "provide intellectual and moral guidance," and to "transmit[ ] the mores of the community.").

school boards may not fire teachers for random classroom comments.[23] Other courts have gone farther, suggesting that a teacher's First Amendment rights encompass the notion of "academic freedom" to exercise professional judgment in selecting topics and materials for use in the course of the educational process.[24]

In some of the cases noted immediately above, the courts did not reach the essential issue of the extent of substantive First Amendment protections, determining that the selection of curricular topics[25] or instructional materials[26] was not intended to send any particularized message and thus was not constitutionally protected expression. Instead, these actions by the teachers constituted conduct not protected by the First Amendment.

In other cases, teachers failed to clear the threshold into the realm of constitutional protection when their in-school speech was deemed not to be on a "matter of public concern."[27] Thus, the speech was viewed as a private employment issue, no balancing test was invoked, and school officials were never put to the test of justifying their actions.[28]

In summary, much of this judicial discussion of "academic freedom" and teachers' First Amendment rights in the classroom has been more rhetoric than reality. In most instances, teachers who invoke these protections have not been successful.

School Authority and Teacher Rights

In disputes between school officials and teachers arising over "academic freedom" or "freedom of expression" in the classroom, courts have consistently supported the authority of boards and administrators to exercise reasonable control over teachers and their teaching. Put simply, in matters of curriculum and instruction, teachers do not enjoy any meaningful constitutional rights in the educational setting.

23. *But see* Zykan v. Warsaw Community Sch. Corp., 631 F.2d 1300, 1306 (7th Cir. 1980)("But nothing in the Constitution permits the courts to interfere with local educational discretion until local authorities begin to substitute rigid and exclusive indoctrination for the mere exercise of their prerogative to make pedagogic choices regarding matters of legitimate dispute.").

24. *See* Fowler v. Board of Educ., 819 F.2d 657, 661 (6th Cir. 1987).

25. *See Cockrel*, 81 F. Supp. at 775 (holding that teacher's selection of industrial hemp as part of curriculum not an exercise of First Amendment rights).

26. *See Fowler*, 819 F.2d at 663 (holding that teacher's showing of film containing violence and nudity to students ranging in age from 14-17 was not intended to convey a particularized message and thus was not a forum of expression protected by the First Amendment).

27. Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 368 (4th Cir. 1998); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 802 (5th Cir. 1989); Schul v. Sherard, 102 F. Supp. 2d 877 (S.D. Ohio 2000).

28. *See* Connick v. Myers, 461 U.S. 138, 146 (1983).

Local authorities have broad discretion in selecting teachers, regulating their pedagogical methods, and choosing a suitable curriculum.[29] Furthermore, school officials have authority to require the obedience of subordinate employees, including classroom teachers.[30]

In matters of curriculum, courts have always acknowledged the authority of state and local school officials,[31] thus leaving teachers little individual discretion about course content. As explained by the Seventh Circuit Court of Appeals,

> Parents have a vital interest in what their children are taught. Their representatives have in general prescribed a curriculum. There is a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society. It cannot be left to individual teachers to teach what they please.[32]

Not only is it within the power of the school board to determine what shall be taught, but how it shall be taught.[33] For example, a teacher dismissed for insubordination had no constitutional right to persist in a course of teaching behavior that contravened the specific directive of her principal.[34] Nor do teachers have any First Amendment right to determine what instructional materials to use.[35]

No court has found that public school teachers' First Amendment rights extend to choosing their own curriculum or classroom management techniques in contravention of school policy or dictates. Although teachers' out-of-class conduct, including their advocacy of particular teaching methods, is protected by the Constitution, their in-class pedagogical method is not protected by academic freedom.[36]

Forum Analysis

In *Hazelwood School District v. Kuhlmeier*,[37] the Supreme Court made clear that school facilities that have been reserved for educational purposes are not "public forums," and "school officials may impose reasonable restrictions on the speech of students, *teachers*, and other members of the school community."[38] And, because a school dis-

29. *See* Board of Educ. v. Wilder, 960 P.2d 695, 699 (Colo. 1998)(citing Edwards v. Aguillard, 482 U.S. 578, 583 (1987)).
30. *See* Webster v. New Lenox Sch. Dist. No. 122, 917 F.2d 1004, 1007 (7th Cir. 1990).
31. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 107 (1968).
32. Palmer v. Board of Educ., 603 F.2d 1271, 1274 (7th Cir. 1979).
33. *See* Newton v. Slye, 116 F. Supp. 2d 677, 686 (W.D. Va. 2000).
34. *See* Ahern v. Board of Educ., 456 F.2d 399, 403-04 (8th Cir. 1972).
35. *See* Fisher v. Fairbanks North Star Borough Sch. Dist., 704 P.2d 213, 217 (Alaska 1985).
36. *See* Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3d Cir. 1990).
37. 484 U.S. 260 (1988).
38. *Id.* at 267 (emphasis added).

trict classroom is not a public forum, a teacher's classroom speech is also subject to reasonable regulation.[39]

Legitimate Pedagogical Concern

Hazelwood held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[40] A number of lower courts have extended the reach of this decision to include a teacher's classroom expression, upholding the authority of school officials to regulate a teacher's speech if the decision to impose that regulation is grounded in a "legitimate pedagogical concern."[41]

The requirement of a "reasonable relationship" may not be a definitively clear standard, but on the other hand it is not difficult to satisfy. Whether a regulation is reasonably related to legitimate pedagogical concerns "will depend on, among other things, the age and sophistication of the students, the relationship between teaching method and valid educational objective, and the context and manner of the presentation."[42]

The implicit assumption of the principle set out in these cases seems to be that even if the teacher's expression may have otherwise enjoyed some constitutional protection, the "legitimate pedagogical concern" underlying the board's decision permitted the board's regulation of the teacher's expression to pass constitutional muster.

School Policies

If school officials do choose to exercise their authority to regulate teachers' choices about curriculum content, instructional materials, or teaching methods, then they should have in place appropriate policies and procedures.[43] On the other hand, the Supreme Court did note in *Hazelwood* that to require that specific written regulations be in place

39. *See* Ward v. Hickey, 996 F.2d 448, 452-53 (1st Cir. 1993); California Teachers Ass'n v. Davis, 64 F. Supp. 2d 945, 953 (C.D. Cal. 1999); Murray v. Pittsburgh Bd. of Pub. Educ., 919 F. Supp. 838, 844 (W.D. Pa. 1996).

40. *Hazelwood*, 484 U.S. at 273.

41. *See* Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 367-68 (4th Cir. 1998); Lacks v. Ferguson Reorganized Sch. Dist. R-21, 47 F.3d 718, 724 (8th Cir. 1998); Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 723-24 (2d Cir. 1994); Board of Educ. of Jefferson County v. Wilder, 960 P.2d 695, 700-02 (Colo. 1998).

42. *Silano*, 42 F.3d at 722-23 (quoting Ward v. Hickey, 996 F.2d 448, 453 (1st Cir. 1993)).

43. *See, e.g.*, Kirkland, v. Northside Indep. Sch. Dist., 890 F.2d 794, 802 (5th Cir. 1989); Krizek v. Cicero-Stickney Township High Sch. Dist. No. 201, 713 F. Supp 1131, 1139 (N.D. Ill. 1989).

for regulating the curriculum could unduly constrain the ability of educators to educate.[44]

Adequate Notice

Closely related to the notion of having appropriate rules in place is the idea that school officials must provide teachers with adequate notice of what speech-related conduct is prohibited.[45] Regulations restricting classroom speech are constitutional insofar as they are reasonably related to legitimate pedagogical concerns, provided that those who may choose to speak are given appropriate notice of what sorts of expressive conduct are out of bounds. But schools are not required to expressly prohibit every imaginable inappropriate conduct by teachers; the standard requires only that teachers be able reasonably to predict the types of conduct that are prohibited.[46] The relevant inquiry is whether, based on existing regulations, policies, discussions, and other forms of communication between administrators and teachers, it was reasonable for the school to expect the teacher to know that the conduct at issue was prohibited.[47]

Due process principles are satisfied as long as the notice is reasonably calculated to reach the intended party. When statutory requirements are at issue, parties receive adequate notice through publication. Similarly, insofar as published policies and regulations are concerned, teachers are presumed to know the standards that govern their conduct. Thus, a teacher is not entitled to actual notice of a school district's policy; rather, a teacher is entitled to reasonable notice, which may be accomplished through publication.[48] For example, a state statute permitting termination of a teacher for "conduct unbecoming a teacher" furnished sufficient notice that an indecent message directed to a student was impermissible.[49]

In addition to statutes and policies, there are certain steps that administrators can take to insure that teachers receive adequate notice of proscribed speech or conduct. For example, a principal's memorandum can give teachers clear written notice that school rules will indeed be enforced. And, even where a requirement of a rule has been waived, the requirement may be reinstated by giving notice to other party.[50] Finally, the sufficiency of notice is reinforced when an admin-

44. *Hazelwood*, 484 U.S. at 273 (1988); *see also Silano*, 42 F.3d at 723 (citing *Hazelwood*'s proposition that requiring regulations in the context of a curricular activity could unduly constrain the ability of educators to educate).
45. *See* Ward v. Hickey, 996 F.2d 448, 453 (1st Cir. 1993).
46. *See* Conward v. Cambridge Sch. Comm., 171 F.3d 12, 23 (1st Cir. 1999).
47. *See Ward*, 996 F.2d at 454.
48. *See* Board of Educ. v. Wilder, 960 P.2d 695, 705-06 (Colo. 1998).
49. *Conward*, 171 F.3d at 23.
50. *See* Fisher v. Fairbanks North Star Borough Sch. Dist., 704 P.2d 213, 215 (Alaska 1985).

istrator provides oral notice to a teacher that school rules prohibit certain kinds of expression.[51]

Vagueness and Overbreadth

School district policies regulating teachers' classroom speech are sometimes challenged as being unconstitutionally "vague" or "overbroad." Overly vague laws are unconstitutional because they fail to provide fair notice of what conduct is prohibited and they invite arbitrary and discriminatory enforcement. A law is unconstitutionally overbroad if it burdens speech protected by the First Amendment; furthermore, the burden on protected speech must be substantial as compared with the burden on unprotected speech.[52] Finally, the principle of adequate notice is embodied in the concept that "a rule that forbids the doing of an act in terms so vague that people of common intelligence must guess as to its meaning and differ as to its application violates due process."[53]

IV. CONSTITUTIONAL CONTOURS OF ACADEMIC FREEDOM APPLIED

This part provides a discussion of cases in which constitutional contours of "academic freedom" have been applied to the act of teaching in K-12 schools. The sections are organized according to the general legal principles that the courts found controlling.

The first three sections provide examples of situations in which teachers prevailed in their challenges to school authority. The remaining sections show the more common outcome of school authority prevailing over teacher rights. Cases are noted so as to describe the factual situations involved.

Inadequate Notice

Several early cases seemed to extend the protection of "academic freedom" to classroom teachers in a meaningful way. It is interesting to observe that all four cases noted below involved the use of language generally deemed inappropriate in a school setting.

- "Academic freedom" protected the tenured teacher of a senior English class from being dismissed for assigning an article that included "a vulgar term for an incestuous son" and then discussing the

51. *See* Lacks v. Ferguson Reorganized Sch. Dist. R-2, 147 F.3d 718, 723-24 (8th Cir. 1998).

52. *See generally* Board of Educ. v. Wilder, 960 P.2d 695, 702-05 (Colo. 1998)(providing a discussion on the doctrines of "overbreadth" and "vagueness").

53. Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1177 (3d Cir. 1990).

article and the word in class; however, the court also noted that he had no adequate notice that this conduct would be prohibited.[54]

- School officials had failed to show either that a short story with some vulgar terms was an inappropriate assignment for high school juniors or that it created a significant disruption to the educational process; furthermore, given that there was no written or announced policy prohibiting the use of such material, an English teacher's dismissal for making this assignment was an unwarranted invasion of her First Amendment right to academic freedom.[55]
- A teacher of eleventh-grade English was discharged for writing the "F" word on the chalkboard as an example of a "taboo" word. Although not clear whether or not this teaching methodology was protected by the concepts of free speech and academic freedom, procedural due process required that the teacher could not be discharged unless the state could prove that he had reasonable notice, either by regulation or otherwise, that he should not use that method.[56] The court of appeals affirmed, finding that a statement in the Code of Ethics relied on by school officials was impermissibly vague, and thus a violation of due process.[57]
- A high school drama teacher was exercising academic freedom by employing methods of teaching reasonably relevant to the subject matter she taught, and the Constitution protected her from dismissal for choosing plays that included scenes with drinking and profanity, when there were no school rules or other prior notice that such plays were not allowed.[58]

Each of these cases seemed to extend some measure of substantive constitutional protection to a teacher's classroom speech. But in every instance, the fact that the school had not provided adequate notice of proscribed conduct was a major factor in the decision.

Protecting the Educational System

Beginning in the 1970s and extending through the 1990s, some courts clearly extended First Amendment rights to teachers in school district classrooms to protect them from adverse employment actions. In each of the cases noted in this section, however, freedom of expression and/or academic freedom was invoked at least in part to protect the internal educational processes from the influence of external disapproval by parents or community.

54. *See* Keefe v. Geanakos, 418 F.2d 359, 362 (1st Cir. 1969).
55. *See* Parducci v. Rutland, 316 F. Supp. 352, 356 (M.D. Ala. 1970).
56. *See* Mailloux v. Kiley, 323 F. Supp. 1387, 1392 (D. Mass. 1971).
57. *See* Mailloux v. Kiley, 448 F.2d 1242, 1243 (1st Cir. 1971).
58. *See* Webb v. Lake Mills Community Sch. Dist., 344 F. Supp. 791, 799-800 (N.D. Iowa 1972).

- A high school teacher was denied the proper exercise of his right of free speech when he was discharged for discussing controversial political and social issues in his political science and civics classes.[59]

- The act of teaching is a form of expression, and the methods used are media; a high school teacher's use of outside speakers in his political science class was his medium for teaching, and thus protected by the First Amendment. An order issued by a board of education banning "all political speakers" was not a reasonable restriction of the teacher's protected expression.[60]

- A public school teacher has a First Amendment right to academic freedom to use a teaching method of his or her own choosing, even though the subject matter may be controversial and sensitive. Thus, absent material or substantial disruption in the school, a teacher could not be dismissed for using in her high school speech and psychology classes a survey from a magazine that included items about sexually explicit matters.[61]

- A nontenured American history teacher could not be dismissed for using a simulation technique that evoked strong student feelings on racial issues to teach about the Reconstruction period. The First Amendment protects classroom discussion, and the discharge could not be upheld absent a finding that the controversial discussions overbalanced her usefulness as a teacher.[62]

- After public protests about the content of his seventh grade life science course, a teacher was suspended, then discharged, even though the school board had approved the textbook and the principal had approved the films. The teacher's exercise of academic freedom had followed rather than violated his superior's instructions, and his First Amendment rights were violated by the adverse personnel actions.[63]

Although none of these decisions turned on the fact that outside forces were at play, that situation was noted with a sense of disapproval in each opinion. It was as if the courts believed that it was in the best interests of education to protect school officials from their own folly.

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59. *See generally* Sterzing v. Fort Bend Indep. Sch. Dist., 376 F. Supp. 657 (S.D. Tex. 1972), *vacated and remanded on issue of appropriate remedy*, 496 F.2d 92 (5th Cir. 1974).

60. Wilson v. Chancellor, 418 F. Supp. 1358, 1364 (D. Or. 1976).

61. *See* Dean v. Timpson Indep. Sch. Dist., 486 F. Supp. 302, 308 (E.D. Tex. 1979).

62. *See* Kingsville Indep. Sch. Dist. v. Cooper, 611 F.2d 1109, 1113 (5th Cir. 1980).

63. *See* Stachura v. Memphis Community Sch. Dist., 763 F.2d 211, 215 (6th Cir. 1985), *rev'd and remanded on issue of damages*, 477 U.S. 299 (1986).

Protecting the Teacher

In two instances, however, academic freedom, or freedom of speech, provided substantive constitutional protection to teachers in their K-12 classrooms. Although neither a notice issue nor an external influence issue was a factor in either case, the first turned on a separate constitutional issue and the second was probably an example of hard facts leading to an anomalous decision.

- A probationary art teacher enjoyed constitutional protections to freedom of expression such that she could not be dismissed for refusing to comply with a school regulation that required her to participate with her high school class in the pledge of allegiance.[64] In this case, however, the acknowledged constitutional right not to be forced to practice an idea contrary to one's belief was determinative.
- A nontenured special needs teacher in a junior high school who invoked the concept of academic freedom was protected from "arbitrary and capricious" employment sanctions for having discussed with three male students in a resource room a number of vulgar words with multiple meanings. School officials contended that she had used bad judgment, but the court found that the discussion of the words was pedagogically valid and that she had in fact admonished the students not to use such words.[65] Even in this case, however, the court noted that had there been in place a school policy banning any articulation of such words in the classroom the teacher would have been bound to respect it.[66]

The paucity of cases in which a teacher has successfully challenged the power of school officials to control classroom expression leads to the conclusion that "academic freedom" as a stand-alone constitutional protection is not a reality for teachers. The cases discussed in the ensuing sections provide abundant proof of judicial affirmation of school authority.

First Amendment Protections Acknowledged, but School Authority Prevails

A number of courts, while expressing the view that teachers do enjoy some First Amendment protections in their classrooms, have nevertheless denied teachers the benefit of that protection. In each case noted in this section, the court saw fit simply to affirm the school's authority.

64. *See* Russo v. Central Sch. Dist. No. 1, 469 F.2d 623, 630-31 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973).

65. *See* Hosford v. School Comm. of Sandwich, 659 N.E.2d 1178, 1182-83 (Mass. 1996).

66. *See id.* at 1182.

Two cases from the 1990s involved a conflict between a teacher's religious views and a school's legitimate interest in curriculum. In each instance, the court acknowledged that the teacher's interest was entitled to constitutional protection, but cited *Tinker v. Des Moines Independent Community School District*[67] for the proposition that in public education an individual's right to free speech is not absolute and may be limited if exercise of that right interferes with the rights of others.

- Establishment Clause considerations led to the conclusion that the school district's removal of two Christian books from classroom shelves and a directive ordering a teacher to cease his silent Bible reading in the classroom did not violate his First Amendment rights to self-expression and academic freedom in the classroom.[68]
- A school district requirement that a high school biology teacher teach the theory of evolution was not a violation of his First Amendment right to free speech.[69]

As noted above, where issues of curriculum and instruction have been involved, teachers consistently have lost their challenges to school authority. Especially in matters of program content, the authority of the school is never questioned. And, while courts have given a respectful nod to the notion that a teacher should have some range of freedom in classroom instructional practices, that has been a hollow promise.

- Although the concept of academic freedom has been recognized in our jurisprudence, it has never conferred on teachers control of public school curricula.[70]
- Public school teachers undoubtedly have some freedom in the techniques to be employed, but they do not have an unlimited liberty protected by the First Amendment to discuss controversial subjects and to use controversial materials in their courses.[71]
- Teachers do have some rights to freedom of expression in the classroom, and they cannot be made to simply read from a script prepared or approved by the board; however, no "right of academic freedom" prevents a board from deleting 10 books from a reading list including 1,275 other titles approved for use in high school language arts courses.[72]
- Although teachers should have some measure of freedom in teaching techniques employed, course content and coverage is mani-

67. 393 U.S. 503 (1969).
68. *See* Roberts v. Madigan, 921 F.2d 1047, 1057-58 (10th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992).
69. *See* Peloza v. Capistrano Unified Sch. Dist., 782 F. Supp. 1412 (C.D. Cal. 1992).
70. *See* Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 800 (5th Cir. 1989).
71. *See* Adams v. Campbell County Sch. Dist., 511 F.2d 1242, 1247 (10th Cir. 1975).
72. Cary v. Board of Educ., 598 F.2d 535, 542 (10th Cir. 1979).

festly a matter within a school board's discretion. Because high school teachers' method of team teaching history affected course content, restrictions imposed did not violate their right to academic freedom.[73]

• A school newspaper advisor did not have a personal First Amendment right to encourage publication of controversial articles. After balancing the interests of the teacher and the interests of the school, the court concluded that the interests of the school in maintaining a harmonious workplace prevailed.[74]

• In denying a teacher's motion for a preliminary injunction, the court balanced her First Amendment rights to classroom expression and the school's right to control curriculum. Because of the extent of the vulgarity and sexual explicitness in a film that the teacher showed to her high school English class, she was unlikely to be able to demonstrate that the decision to not renew her contract was unreasonable.[75]

Forum Analysis

Recognizing that a typical public school classroom is not a "public forum," courts have required schools to satisfy only a test of "reasonableness" in regulating classroom expression. But requiring school officials to meet even this minimal standard does imply that a teacher's classroom expression enjoys at least some modest constitutional protection.

• For First Amendment purposes, a teacher's expression in a traditional classroom setting must be treated as school-sponsored expression in a nonpublic forum; thus, the teacher of a ninth-grade government class had no constitutional right—based on academic freedom or anything else—that protected his substantiation in class of a rumor about inappropriate student behavior.[76]

• The prohibition of a teacher's use in her classrooms of a certain game as a motivational technique was not in violation of the First Amendment. High school classrooms are nonpublic fora, and the school's restriction on teacher's speech satisfied the test of reasonableness.[77]

• A teacher was not free to post material that contradicted board policy regarding tolerance of gays and lesbians. Bulletin boards were school's speech, not teachers. A school's control of its own speech in a nonpublic forum is not subject to the constraints of constitutional safeguards and forum analysis, but instead is measured by practical con-

73. *See* Millikin v. Board of Dir., 611 P.2d 414, 417-18 (Wash. 1980).
74. *See* Nicholson v. Board of Educ. Torrance Unified Sch. Dist., 682 F.2d 858 (9th Cir. 1982).
75. *See* Krizek v. Cicero-Stickney Township High Sch. Dist. No. 201, 713 F. Supp. 1131 (N.D. Ill. 1989).
76. *See* Miles v. Denver Pub. Sch., 944 F.2d 773 (10th Cir. 1991).
77. *See* Murray v. Pittsburgh Bd. of Pub. Educ., 919 F. Supp. 838 (W.D. Pa. 1996).

siderations applicable to any individual's choice of how to convey oneself: among other things, content, timing, and purpose. When the State is the speaker, it may make content-based choices. A school board may decide to advocate for a point of view and restrict the contrary speech of one of its representatives.[78]

Legitimate Pedagogical Concerns

Hazelwood School District v. Kuhlmeier[79] held that educators may exercise editorial control over student speech in school-sponsored activities so long as their actions are reasonably related to legitimate pedagogical concerns.[80] Some lower courts have extended the constitutional underpinnings of that holding to encompass a teacher's classroom activities. But although the burden of justification in such cases is modest indeed, courts will look for an educational rationale, and school officials should be prepared to provide one.

- A school board policy prohibiting profanity in the classroom was reasonably related to legitimate pedagogical concern of promoting generally acceptable social standards, and teacher had adequate notice of that policy; thus, the First Amendment did not prevent her dismissal for violating school policy by allowing students in her high school English classes to use profanity in their creative written work.[81]

- A school district's policy regarding classroom use of controversial materials was reasonably related to legitimate pedagogical concerns, and teacher had no First Amendment right to use nonapproved controversial learning resources in his high school classroom without first obtaining administrative approval as the policy required.[82]

- A volunteer lecturer (a retired filmmaker, who happened to be a school board member) had no First Amendment right to show film clips with photographs of bare-chested women to tenth-grade mathematics students during a lecture on the scientific phenomenon of "persistence of vision." Given that the disputed film clip was entirely unnecessary to the subject matter of his lecture, school officials had a legitimate pedagogical purpose in restricting the display of these photographs in this classroom setting.[83]

78. *See* Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003, 1013 (9th Cir. 2000).

79. 484 U.S. 260 (1988).

80. *See id.* at 273.

81. *See* Lacks v. Ferguson Reorganized Sch. Dist. R-2, 147 F.3d 718, 724 (8th Cir. 1998).

82. *See* Board of Educ. v. Wilder, 960 P.2d 695, 701-02 (Colo. 1998).

83. *See* Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 721-23 (2d Cir. 1994).

No First Amendment Protections Acknowledged

In a series of cases that began about 1970, courts determined that First Amendment protections simply did not apply to teachers' expressive activities in the classroom. At issue in this set of cases were curriculum content and instructional practices.

In two Seventh Circuit cases, the courts took the position that a teacher's religious interests were not protected by the First Amendment and never reached any balancing of the interests, simply affirming the authority of school officials to control curriculum.

- A probationary kindergarten teacher had no constitutional right to disregard the prescribed curriculum concerning patriotic matters, on the claimed grounds that conforming to the curriculum would conflict with her religious principles.[84]
- Given the school board's important pedagogical interest in establishing curriculum and legitimate concern with possible Establishment Clause violations, its prohibition on the teaching of "creation science" to junior high students was appropriate and did not violate the teacher's First Amendment rights.[85]

In like fashion, many other courts denied teachers any constitutional protected interests in their classroom expression by simply affirming the authority of school officials over matters of curriculum and instruction.

- A high school economics teacher, who implemented a philosophy that allowed students to make many decisions about subjects for daily discussion, course materials, and classroom rules, was dismissed for insubordination. Her "academic freedom" claim failed because she had no constitutional right to persist in a course of teaching behavior that contravened her employer's valid dictates regarding appropriate classroom methods or content.[86]
- A teacher had no right, under the principle of academic freedom or any other theory, to require eleven-year-old girls to write a very vulgar word repeatedly and in the presence of their classmates as a form of punishment.[87]
- Teachers' claim that their dismissals for distributing to eighth grade students a brochure with an inappropriate poem violated their right to academic freedom failed; the reach of the First Amendment does not extend so far that the school board had to tolerate the distribution of obviously inappropriate material.[88]

84. *See* Palmer v. Board of Educ., 603 F.2d 1271 (7th Cir. 1979).
85. *See* Webster v. New Lennox Sch. Dist., 917 F.2d 1004, 1008 (7th Cir. 1990).
86. *See* Ahern v. Board of Educ., 456 F.2d 399, 403-04 (8th Cir. 1972).
87. *See* Celestine v. Lafayette Parish Sch. Bd., 284 So. 2d 650, 655 (La. App. 1973).
88. *See* Brubaker v. Board of Educ., 502 F.2d 973 (7th Cir. 1974).

- A tenured high school teacher had no First Amendment right to use a book that school officials would not approve for use in teaching a unit on homosexual rights in his American Minorities course.[89]
- A teacher had no right of academic freedom that extended to her choice of Learnball classroom management techniques; the school had banned its use because it was not an appropriate pedagogical method.[90]
- Teachers do not have a First Amendment right to be free of regulations that tell them to follow a method of instruction or a curriculum, and the state can dictate to teachers that they must teach in English.[91]

Conduct, Not Expression

There have been cases where teachers contended that certain classroom conduct was constitutionally protected speech, but the courts determined that the conduct at issue was not a form of expression for First Amendment purposes.

- A teacher's First Amendment rights encompass the notion of "academic freedom" to exercise professional judgment in selecting topics and materials for use in the educational process. However, a teacher's showing of a film containing violence and nudity to high school classes on a noninstructional day was not done to convey any message and thus did not constitute expression protected by the First Amendment.[92]
- Because a teacher's refusal to assign a grade as instructed by his superiors is not a teaching method, it is neither a principle of academic freedom nor a matter of public concern. Thus, adverse employment actions imposed on a high school mathematics teacher for refusing to assign an athlete a grade was not a violation of his First Amendment rights.[93]
- A teacher's presentation to her fifth grade class of segment on industrial hemp as part of her curriculum was conduct that did not constitute an exercise of her First Amendment rights.[94]
- A male teacher's handing an "Application for a Piece of Ass" to a female student in a study hall was not constitutionally protected expression. Although the teacher claimed that his intent was to suggest that swear words were inappropriate, this was not the kind of expres-

89. *See* Fisher v. Fairbanks North Star Borough Sch. Dist., 704 P.2d 213 (Alaska 1985).
90. *See* Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3d Cir. 1990).
91. *See* California Teachers Ass'n v. Davis, 64 F. Supp. 2d 945, 953-54 (C.D. Cal. 1999).
92. *See* Fowler v. Board of Educ., 819 F.2d 657 (6th Cir. 1987).
93. *See* Bates v. Dallas Indep. Sch. Dist., 952 S.W.2d 543, 549 (Tex. App. 1997).
94. *See* Cockrel v. Shelby County Sch. Dist., 81 F. Supp. 2d 771, 776 (E.D. Ky. 2000).

sive conduct that was intended to convey a particular message under circumstances that the message would have been so understood by the adolescent recipient reading the lascivious content.[95]

Not a Matter of Public Concern

Courts tend to view a teacher's choice of curricular materials or instructional methodology as being an internal matter relating to employment, rather than "speech on a matter of public concern." Thus, there is no need to balance the interests of the school and the interests of the teacher.

- The First Amendment did not empower a public high school history teacher to use his own supplemental reading list, instead of the list approved by school officials. Because the teacher's use of his separate reading list was not a matter of public concern, the inquiry here did not advance to a balancing of the interests of the teacher and the interests of the school.[96]
- A high school teacher did not have a First Amendment right to select a controversial play to be performed by students in her advanced acting class. Neither the selection of the play by the teacher nor the editing of the play by the principal presented a matter of public concern; thus, this situation was nothing more than an ordinary employment dispute.[97]
- A track coach's remarks to track athlete about benefits of caffeine did not address a matter of public concern, but only the private concern of enhancing the student's performance. And, assuming that remarks did touch on a matter of public concern, the school district's interests outweighed those of the coach's.[98]
- Refusing to assign a passing grade to a student as directed by the principal was a private matter, not a matter of public concern; thus, the refusal was not a principle of academic freedom protected by the First Amendment.[99]
- A teacher's posting of a pamphlet on his classroom door was not constitutionally protected. Given the school context, a pamphlet warning about book banning was not speech on a matter of public concern; instead, the pamphlet was part of the school's curriculum. Also, because of the control exercised by the school, the school had not established a public forum for such postings.[100]

In one decision, a court of appeals did assume that a teacher's in school criticism of an educational program touched on matters of pub-

95. *See* Conward v. Cambridge Sch. Comm., 171 F.3d 12, 22 (1st Cir. 1999).
96. *See* Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 800 (5th Cir. 1989).
97. *See* Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 368 (4th Cir. 1998).
98. *See* Schul v. Sherard, 102 F. Supp. 2d 877, 886 (S.D. Ohio 2000).
99. *See* Bates v. Dallas Indep. Sch. Dist., 952 S.W.2d 543 (Tex. App. 1997).
100. *See* Newton v. Slye, 116 F. Supp. 2d 677 (W.D. Va. 2000).

lic concern. But victory on this threshold issue did not lead to a final decision in favor of the teacher.

• Giving a student teacher the benefit of the doubt, the court treated his conduct and expressions of opprobrium as involving matters of public concern that required a balancing of interests. But, where a student teacher elected a mode of communication – audible denigration and visible petulance in the learning environment, in front of students and others – that plainly conflicted with the school's legitimate interest in requiring full participation in the designated curriculum, the constitutional balance tipped sharply in the school's favor.[101]

V. CONCLUDING OBSERVATIONS

A review of the cases discussed above suggests that there is in fact some level of First Amendment protection – modest though it may be – accorded to the "academic expression" of public school teachers in their schools and classrooms. If this were not so, then courts would not find it necessary to engage in discussions about school officials having satisfied a test of reasonableness or having addressed a legitimate pedagogical concern.[102]

Nevertheless, school boards and administrators do retain considerable legal power to regulate what teachers do and say in their classrooms. If this were not so, then much administrative supervision and evaluation of teachers would be pointless. But prudent school officials must acknowledge the professional expertise that teachers bring to their task and extend to them at least some freedom to make individual judgments about the exact curriculum to be followed, the instructional materials to be utilized, and the teaching techniques to be employed.

As schools officials exercise their authority over teachers in regard to their teaching activities, they need to be aware that constitutional protections – both substantive and procedural – do sometimes come into play. Several basic principles should be noted.

• School officials should enforce reasonable expectations about what teachers do and say in their classrooms.

• School officials should have policies and procedures in place that provide teachers with adequate notice of any regulations of their classroom teaching activities.

• School officials should not succumb to political pressures that may be brought to bear because of teaching content or methodology,

101. *See* Hennessy v. City of Melrose, 194 F.3d 237, 247-48 (1st Cir. 1999).

102. Given the minimal First Amendment rights available, employment contracts and tenure laws provide teachers more legal protection than do constitutional principles of "freedom of expression" or "academic freedom."

which while educational sound, may be controversial in the community.

- School officials should be prepared to offer a reasonable educational justification for any action they choose to take in regard to a teacher's academic expression.

A teacher's "academic freedom" in K-12 schools, as grounded in the First Amendment, is more myth than reality. Clearly, school officials have great constitutional latitude to regulate a teacher's academic expression in the school environment. But school boards and administrators must always be mindful that what is legally permissible may not always be educationally sound. Their rhetoric about the professionalism of teachers must be matched by their respect for the unique talents that teachers bring to their classrooms.